Filed 4/16/19 P. v .Vaughn CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DONTAE PIERRE VAUGHN,<br><br>Defendant and Appellant. | C086582<br><br>(Super. Ct. No. 16FE015501) |

Following the denial of his motion to suppress,[1] defendant Dontae Pierre Vaughn pled no contest to being a felon in possession of a firearm and was sentenced to 16 months in prison. On appeal, defendant's sole contention is the magistrate erred in denying his motion to suppress. We affirm.

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[1] The motion was heard by the magistrate concurrently with the preliminary hearing.

## FACTUAL AND PROCEDURAL BACKGROUND

On August 4, 2016, Sacramento County Sheriff's Deputy Gabe Maggini and Detective Dave Feldman were driving through a Days Inn parking lot[2] when they spotted defendant's car. Deputy Maggini noticed the car's windows were tinted in violation of Vehicle Code section 26708.5. He approached the car, and when defendant lowered the driver's side window, the distinct smell of burnt marijuana emanated from the car. Further, defendant told Deputy Maggini he had a medical marijuana card and handed him a small amount of fresh marijuana. Deputy Maggini returned to his car to run a records check on defendant and determined he did not have a warrant and was not on probation or parole. Meanwhile, Detective Feldman, who was standing about 10 feet behind defendant's car, noticed through the rear window, defendant leaning to the right toward the passenger side of the vehicle for about five seconds. Deputy Maggini returned and ordered defendant out of the car, and upon searching it, discovered a loaded .40-caliber handgun with 13 live rounds of ammunition under the passenger seat.

Defendant moved to suppress the evidence, and the trial court denied the motion, holding officers could search the car once they smelled burnt marijuana. This appeal followed.

## DISCUSSION

Defendant acknowledges the reasonableness of his initial contact with police based on Deputy Maggini's belief the windows of the car were excessively tinted. He argues, however, the suppression motion should have been granted because the search was not justified by the window tinting, the small amount of marijuana, or defendant's movements inside the vehicle. We disagree.

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[2] The parking lot was an area the deputy routinely patrolled because it generated a lot of service calls and arrests.

When reviewing a trial court's denial of a motion to suppress, we defer to the court's factual findings, express or implied, where supported by substantial evidence. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) "In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*Ibid*.)

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures. (U.S. Const., 4th Amend.) Warrantless searches are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." (*Katz v. United States* (1967) 389 U.S. 347, 357 [19 L.Ed.2d 576, 585].) One such exception is the automobile exception, which gives police the right to search a car without a warrant if they have probable cause to search. (*People v. Waxler* (2014) 224 Cal.App.4th 712, 718.)

Probable cause to search exists where the facts and circumstances are sufficient to warrant an officer of reasonable prudence to believe, and conscientiously entertain, a strong suspicion contraband or evidence of a crime will be found in the particular place. (*Ornelas v. United States* (1996) 517 U.S. 690, 696 [134 L.Ed.2d 911, 918].) It does not, however, require a showing of actual criminal activity, and courts have not limited the automobile exception to the possession of a *criminal amount of contraband*. (*People v. Waxler*, *supra*, 224 Cal.App.4th at p. 723.) In our probable cause determination, we apply the totality of the circumstances test. (*Illinois v. Gates* (1983) 462 U.S. 213, 230-231, 238 [76 L.Ed.2d 527, 543-544, 548].)

Defendant, in arguing the search incident to arrest exception did not authorize the search, urges the court to follow the reasoning in *People v. Macabeo* (2016) 1 Cal.5th 1206, 1211, where the court held a search of a *defendant's cell phone* incident to his arrest was not justified where he was initially stopped for a Vehicle Code infraction, and *In re D.W* (2017) 13 Cal.App.5th 1249, 1253, where the court held the search of *a person* was not justified based on the admission of smoking marijuana.

We agree the search incident to arrest exception did not authorize the search of defendant's car. Indeed, our case is distinguishable for that reason. *Macabeo* and *D.W.* involve the warrantless search of a cell phone and a person incident to arrest, both which require independent probable cause for an *arrest*. (*People v. Macabeo*, *supra*, 1 Cal.5th at p. 1211; *In re D.W*, *supra*, 13 Cal.App.5th at p. 1253.) In contrast, the instant matter involves a car search pursuant to the automobile exception, which requires probable cause to *search.*

Under California law at the time defendant was stopped, nonmedical marijuana was contraband. (*People v. Waxler*, *supra*, 224 Cal.App.4th at p. 715.) Hence, its presence could provide probable cause to search a vehicle under the automobile exception. (*Ibid.*) Defendant encourages the court to reconsider established precedent in light of the passage of Proposition 64[3] and other changes to marijuana possession law. (Health & Saf. Code, § 11357; *People v. Smit* (2018) 24 Cal.App.5th 596, 600.) The legalization of marijuana in California, he argues, reflects the unreasonable nature of a warrantless search based on marijuana possession.

Defendant, however, "overstates the effect of Proposition 64." (*People v. Fews* (2018) 27 Cal.App.5th 553, 563.) Continued regulation of marijuana indicates courts will still permit "officers to conduct a reasonable search to determine whether the subject of the investigation is adhering to the various statutory limitations on possession and use, and whether the vehicle contains contraband or evidence of a crime." (*Id*. at p. 562.) Further, evidence of recently burned marijuana may support a reasonable inference an individual was driving under the influence of marijuana. (*Id*. at p. 563.)

While we acknowledge recent amendments to marijuana possession laws, which took effect after the search in this case, we refuse to deviate from established precedent

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[3] Control, Regulate and Tax Adult Use of Marijuana Act, as approved by the voters, General Election, November 8, 2016.

which affirms the reasonableness of probable cause to search a car based on the odor or visual observation of any amount of marijuana. (*United States v. Johns* (1985) 469 U.S. 478, 482 [83 L.Ed.2d 890, 895] [holding officers had probable cause to search a car when they noticed the distinct odor of marijuana upon getting closer to the car]; *People v. Waxler*, *supra*, 224 Cal.App.4th at p. 725 [holding *any* amount of marijuana establishes probable cause to search the car]; *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059 [holding the odor of marijuana provided sufficient probable cause to search the car]; *People v. Dey* (2000) 84 Cal.App.4th 1318, 1320-1322 [holding discovery of a small amount of marijuana in passenger compartment during lawful search justified a search of the remainder of the car].)

Here, not only did the smell of burnt marijuana emanate from defendant's car, but defendant showed Deputy Maggini a small amount of fresh marijuana. Knowing there was at least some marijuana in the car, "a person of ordinary caution would conscientiously entertain a strong suspicion that even if defendant makes only personal use of the marijuana, . . . he might stash additional quantities for future use" in the car. (*People v. Dey*, *supra*, 84 Cal.App.4th 1318 at p. 1322.)

The fact defendant may have had a medical marijuana prescription and could lawfully possess marijuana does not detract from the officer's probable cause because Deputy Maggini could have still reasonably suspected defendant was in possession of an amount greater than what he was allowed to have or was driving impaired. (*People v. Strasburg*, *supra*, 148 Cal.App.4th at p. 1059.)

Defendant argues his furtive movements did not authorize the search and cites to three cases where officers based their searches *solely* on the unusual movements of the defendants. (*Gallik v. Superior Court* (1971) 5 Cal.3d 855, 858-859 [to constitute probable cause, a furtive gesture must be accompanied with guilty significance]; *People v. Superior Court* (1970) 3 Cal.3d 807, 823 [mere furtive movement of occupant of vehicle being chased by officer for traffic violation insufficient to establish probable

cause]; *People v. Lathan* (1974) 38 Cal.App.3d 911, 916 [furtive movements must be such as to have a criminal connotation].)

We agree with the precedent set in these cases. Our facts are distinguishable, however, because not only did officers see unusual movements, but they also smelled and saw marijuana, which in and of itself gave probable cause to search the vehicle. (*Gallik v. Superior Court, supra*, 5 Cal.3d at p. 858.)

Under the totality of the circumstances, we conclude Deputy Maggini, informed by the scent of burnt marijuana, the physical presence of fresh marijuana, and defendant's furtive movements, had probable cause to believe contraband or evidence of unlawful marijuana possession would be found in the car. Therefore, the warrantless search did not violate the Fourth Amendment.

DISPOSITION

The judgment is affirmed

/s/
Robie, Acting P. J.

We concur:

/s/
Mauro, J.

/s/
Duarte, J.